CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *July*, 1822.

EASTERN DISTRICT, JULY TERM, 1822.

DUNCAN vs. HAMPTON.

DUNCAN *vs.* HAMPTON.

It is not too late to pray for the transfer of a cause after setting aside a judgment by default, if the judgment was improperly taken.

APPEAL from the court of the first district.

PORTER J. I should have preferred taking no part in the decision of this case, as it has grown out of transactions involved in the suit of *De Armas* vs. *Hampton*, in which I was counsel, but a difference of opinion between my colleagues, has imposed on me the necessity of examining it.

The attorney for the defendant swears, and his affidavit stands uncontradicted, that he was surprised by the jndgment by default, as at the time it was taken, there was an understanding between him and the plaintiff to argue the question of removal the first day the court was at leisure.

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On this statement I agree in the conclusion which judge Mathews has come to, and for the reason given by him. I think that the error, if any of defendant, was caused by plaintiff, and that he cannot now take advantage of a mistake which was the consequence of his own act. It would be permitting him to profit by his own wrong.

It is therefore my opinion the judgment of the district court be affirmed with costs.

MARTIN J. Judgment by default was taken, in this suit, which was instituted by attachment. On the next day *Preston*, who had received from the sheriff a copy of the petition, and admitted that he was the defendant's attorney (and who had been also appointed by the court to defend him) obtained a rule that the plaintiff shew cause on the 30th of the same month, why the judgment by default should not be set aside. On which day the rule was enlarged till the 13th of April.

In the mean while, *viz.* on the 6th of April the parties were heard, and after argument, the judgment was set aside.

A petition was next presented, on which the suit was transferred to the court of the United

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States for the Louisiana district, under the 12th section of the judiciary act of the United States. 2 *Laws U. S.* 61. The defendant appealed.

It is admitted that the petition to transfer comes *too late*, after an appearance entered; for the act of congress has fixed the time when the transfer is to be prayed for, *viz : at the time of entering the appearance.*

So that the sole question for determination is, had the defendant appeared before the 6th of April, when the petition was filed.

The record shews that *Preston* was appointed to defend the suit by the court, on the 26th day of March; that he had received from the sheriff on the 15th of March as attorney in fact of the defendant, a copy of the petition and attachment; that he had written authority to represent the defendant in court, but was expressly directed to require a transfer to the court of the U. States.

That on the 27th, he came into court, and as the attorney of the defendant, obtained a rule on the plaintiff to shew cause why the judgment should not be set aside.

That he attended on the 30th, the return day of his rule, when it was enlarged, and

after extended till the 13th, and in the mean while he attended again, *viz :* on the 16th, when he succeeded to have the judgement set aside.

In this state, the practice of a party or attorney formally entering an appearance, is unknown. The defendant or his attorney enters abruptly on the defence, by any step which he deems proper, without any previous appearance, and he continues to act till the final determination of the suit, without any other appearance.

It seem to me that any act of the defendant or of any attorney of the court, in his name, (while the attorney is not expressly disavowed) constitutes an appearance, and the record of such an act is the entry of his appearance.

Had *Preston*, in this case, filed an answer, the filing of it would have been the entering of the appearance of the defendant.

I cannot say that the application to have the judgment set aside is not likewise an appearance, entered for the defendant. Had the district court after argument declined to set the judgment by default aside, the judgment would have been final and regular. I cannot see on what ground a transfer could

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then have been obtained. If it had been prayed for, the answer would have been that the application was too late. If it should be deemed too late in such case, it must be because the time of entering the appearance was past. If it was past, the fate of the application, for setting the judgment by default aside, cannot have brought it back.

It is said the appearance was for the purpose of obtaining the setting aside of the judgment by default, as a preliminary step to the transfer.

I think such a step was needless.—If the party had applied in time, his situation could not have been marred by any previous step of his adversary. On the arrival of the record in the court of the U. States, the judge there might strip the case of any illegal proceedings in the original court.

It is urged that Preston acted without authority; that his client had directed him to have the case transferred, and that any thing done by him, contrary to his instructions, or the directions of his client is void.

I think not. He is an attorney duly licensed; the record shews he was empowered by the court to act; none of his acts are disavow-

ed by the defendant. We must believe till the contrary be urged by some other person, than the attorney himself, that he did only what he had right to do.

It seems to me the time of the transfer had passed by, and the judge *a quo* erred in directing it; we ought to reverse his order, remand the case and direct him to proceed, thereon as if no petition for a transfer had been filed, and order the defendant and appellee to pay the cost of this appeal.

MATHEWS, J. This is an appeal taken from an order of the court below, to remove the cause to a court of the United States. As we are unanimously of opinion that the judgment rendered by the district court is a decision, from which an appeal ought to be sustained, it is unnecessary to investigate that part of the cause. But I do not think the appearance made by the defendant's attorney, for the sole purpose of having a judgment by default, (which had been improperly taken against him) set aside, is such an appearance, as to give jurisdiction to the state court, in exclusion of his client's right to have the cause removed to a court of the United States, as provided for by the act of congress.

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A petition to have a suit transferred from a state court, to a court of the United States, may be considered to partake of the nature of a plea in abatement, or dilatory exception to the jurisdiction of the court, in which the action has been commenced; and a defendant ought not to be permitted to avail himself of it, after having done any act, acquiesing in, and acknowleging the jurisdiction of said court.

A judgment by default, in our courts, is always obtained on the failure of the defendant to appear and answer, and may be set aside on good cause being shewn; and if it should have been illegally taken, he will then be at liberty to plead to the action, as if none such had been rendered.

It is, perhaps true, that according to the act of congress, on the subject of removing suits from the state courts to those of the United States, the appearance of the defendant, and petition of transfer, ought to be simultaneous: but this must be understood of appearance to the action, for the general purpose of answering and pleading as circumstances may require. When any step has been taken in a cause, founded on the want of appear-

ance, as in the present case, and the defendant afterwards appears for the sole and avowed purpose of having such step retraced, I cannot perceive any good reason to determine that such an appearance should work a forfeiture of any of his rights and privileges, in relation to the ordinary defence of the suit; especially as the first step was illegal, being made contrary to express agreement between the parties.

It is agreed that the manner of defendants appearing in courts of the several states is variant. In ours, it is by coming in and filing an answer to the plaintiff's petition, or obtaining time to answer. According to the common law, appearance is when the defendant shews himself in court in person, or by his attorney, ready to answer to the action. 5 *Com. Digest, tit. Plead.* 286. But although the tenant or defendant be in court, and says that he will not appear, this is no appearance. *Same author*, 287. So, I should be disposed to believe, that when a defendant appeared, declaring his object in so doing, to be for one particular purpose alone, it ought not to be construed an appearance, to answer generally to the action—and acknowlege the jurisdiction of the court.

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In judicial proceedings under the rules of the Spanish law, the first dilatory exception to be made, is that which declines the jurisdiction of the court: for if any other is first put in, its jurisdiction is considered as admitted by the defendant; whenever the court is competent to adjudge the cause. But if a defendant appear before a court to litigate, saving his exceptions, he is not precluded by thus appearing from pleading any exception or dilatory plea. *Curia Phillipica*, *Dilationes*, *nos.* 7 & 8.

In the case now under consideration, it is shewn by the affidavit of the attorney for the defendant, that he stated, from the beginning, his object, in appearing in the state court, was to cause his client's suit to be removed into the proper court of the United States, and that the jndgment by default was taken on him by surprise, contrary to an express agreement between him and the plaintiff.

A judgment by default, obtained under such circumstances, must be viewed as null and void *ab initio*, and the appearance of the defendant's attorney for the sole purpose of having said nullity declared by the state court, in order that the cause might be trans-

ferred to the United States court, unincumbered with any judicial proceeding of the former, ought not to destroy his client's right and privilege to have the suit removed. If we add to all this, that the attorney was expressly required by his constituent, to remove any suit which might be comenced against him, to the court of the United States, I cannot perceive any error in the judgment of the judge, *a quo*.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Preston* for the defendant.

M'KENZIE vs. *HAVARD*.

APPEAL from the court of the eighth district.

A judgment which contains no reference to any law, nor any of the reasons on which it is grounded. must be reversed.

MARTIN J. delivered the opinion of the court. The plaintiff stated that he obtained a judgment in the state of Mississippi against one Elijah Havard for $454 38½ cents, on which a *fi. fa.* issued and was returned, no property of the defendant being found, and

The debt of a husband cannot be enforced against the widow, if she be not his heir or

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afterwards the said Havard died; that the present defendant, widow of said Elijah, after his death, removed into this state, bringing with her a negro woman named Sal, for the express purpose of defrauding the plaintiff; that she has no fixed place of residence; that the negro woman Sal is the only part of Elijah Havard's estate known to the plaintiff, who believes that the defendant will so conceal herself and the said negro woman Sal, that, in the ordinary course of proceedings, no judgment can be obtained against her, as the legal representative of her husband. Whereupon he prayed for an attachment against the estate of the deceased, that the defendant be decreed to pay the plaintiff's claim, and that Noel Wells be cited as a garnishee.

representative, and did not reside, during the marriage, in a state in which a community of goods exist.

Judgment, in other states, do not give any lien here, when their execution is not ordered by a judge of this.

The defendant pleaded the general issue, averring that the negro woman attached was her own property *bona fide* acquired by purchase in *her own* right, and is not liable to the debts of her husband; that she never attempted to conceal her, but she has possessed her openly and publicly for several years past, that the negro girl was brought into the state of Louisiana, in the summer of the year 1820, and has been detained in it by sickness.

There was judgment for the defendant, and the plaintiff appealed.

The attorneys of the parties have certified that at the trial, David Havard was produced as a witness for the plaintiff, and objected to. He was sworn on his *voire dire*, and deposed that Elijah Havard, left no heir in the ascending or descending line, and the witness is his brother. The defendant's counsel prayed he might be set aside, as interested in the event of the suit, as one of the next of kin. The objection was overruled.

On his examination in chief he deposed that he sold the slave in the petition to his brother Elijah Havard, the defendant's husband, and executed a bill of sale.

It was admitted that in the state of Mississippi, there must be written evidence of the sale of a slave.

Elijah Havard died in the parish of St. Tammany, in this state.

Neither the plaintiff nor the defendant resides in this state.

No testamentary letter was exhibited.

The property attached had been in the possession of the defendant, for upwards of twelve months, before the inception of the

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present suit, and was proven to have been seen in her possession in the state of Mississippi, as early as 1819. Her possession was open and public, and the plaintiff lived in the immediate neighbourhood.

J. W. Haymen deposed that his father wrote a bill of sale for Elijah Havard, and gave it to Noel Wells. He does not know for what purpose, nor what was the consideration.—At the time, he understood there was a law suit between the present plaintiff and E. Havard; he does not know that a judgment was obtained.

Elijah Havard and David Havard were at variance from the time of the execution of the bill of sale of the negro Sal.

To the best of the witness's knowledge, the money with which said negro was purchased, belonged to Rachel Havard, and was the produce of her care and industry.

The bill of sale, executed by Elijah Havard to Noel Wells, was such as conveyed a good title.

Wm. Powel deposed that after judgment was rendered, in favor of the present plaintiff against Elijah Havard, the latter said, in the presence of witness, that he would transfer

his property in such a way that the plaintiff could not recover any part of his judgment.

At the time of the rendition of the judgment, E. Havard had a negro woman called Sal, and had her in possession some time after.

After judgment was obtained, the witness travelled with Elijah Havard to Justice Haymen's, where the said Havard told the witness, a transfer of all his property was to be made to Noel Wells, for the purpose of keeping the plaintiff from recovering the amount of his judgment.

The case has been submitted without any argument.

We are sorry to observe that the judgment does not contain a reference to any law, nor any of the reasons on which it is grounded.

This violation of the constitution imposes on us the obligation of reversing the judgment, and it is accordingly annulled, avoided and reversed, at the costs of the defendant and appellee.

Proceeding to examine the record, with the view of discovering what judgment the district judge ought to have pronounced, we cannot discern how the plaintiff's case can be supported.

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If he has a claim against the estate of the defendant's late husband, he ought to enforce it against his heir or representative. Nothing authorises the defendant to settle it. There is no evidence that she is his heir or representative. If the slave belong really to the estate, as neither the judgment nor the *fi. fa.* issued in the state of Mississippi gives a lien which the courts of this state can recognise, *Civ. Code*, 454, *art.* 12, the plaintiff must establish his claim contradictorily with the heir, or a curator, if the estate be vacant. If the slave be not part of the estate, our courts cannot order her sale for the payment of the plaintiff's claim. If she be, the heir, to whom the title passed by the death of the ancestor, must be heard, before his property be acted upon.

It is therefore ordered, adjudged and decreed, that there be judgment for the defendant with costs in the district court.

Preston for the plaintiff.

Tutors are not bound to pay compound interest.

The provision of the law, that requires that the

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APPEAL from the court of the fourth district.

MARTIN, J. delivered the opinion of the

court. The plaintiff claims from his tutor, the balance of his estate, in the hands of the latter, whose creditors intervened to reduce this balance. There was judgment in the plaintiff's favor, and, imagining that less was allowed him than is really due, he appealed.

tutor's account be rendered before the judge, is clearly introduced for the exclusive advantage of the minor. No other person can have any interest in it.

The district court charged the tutor with simple interest, on the funds in his hands. *Civ. Code*, 70, *art.* 71, while it is urged, he was chargeable with compound.

The plaintiff's counsel urges that monies received for the interest of the minor's funds, produces interest, in his tutor or curator's hands. *L.* 7, § 12, *ff. de adm. & per. tutor. l.* 58, *id.*

These authorities expressly establish, that when the tutor receives the interest due to the minor, he is bound to make the money, thus received, produce interest. And it is urged, that as the tutor is bound to make the interest, he thus receives, capital; so he ought to make the interest which becomes due from himself capital; and if he does not, he becomes chargeable in the same manner as if it had been done.

In order that we might reverse the judgment of the district court in this respect and de-

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cree compound interest, it should be established that interest becomes payable yearly. It is true the yearly is the usual rate, but notwithstanding this, the law never allows, but universally reproves, compound interest. It is true, that after interest has actually accrued if the parties agree that it shall bear interest, this convention is legal; but then the interest which thus becomes capital, can only be made to produce simple interest, and the new interest will not become principal without a new convention.

Interest due may also be made to produce interest, *i. e.* simple interest, by a judicial demand.

A prospective convention that compound interest shall be allowed, or even that the interest which is to accrue shall bear simple interest, is, it is believed, still reprobated by law.

Thus in the case of *Bludworth* vs. *Sompeyrac*, 3 *Martin*, 719, the plaintiff having taken a note for $4663 65, to secure a loan of $3854, for two years, (the calculation being made by compounding the interest) at 10 per cent, we reversed the judgment of the district court, which had allowed this claim, and we reduced the compound to simple interest.

The tutor cannot, unless a special convention, authorises the demand, require the holders of the minor's capital to pay the interest yearly, or distinctly and apart, from the capital. Interest so virtually constitutes a part of the capital that it is not demandable after the recovery of the principal. *Faurie* vs. *Pitot*, 2 *Martin*, 83.

If the holders of the minor's funds cannot be compelled, without a special convention, to pay the interest distinctly from the capital, the same principle must regulate the obligation of the tutor.

The interest, which a judicial demand gives a rise to, is simple. The general principles of the law do not, as far as our recollection serves, tolerate the allowance of compound interest, in any case.

We conclude that no authority appears to sanction the plaintiff's claim for compound interest.

It is urged minors have a strong title to it on principle; otherwise a tutor may, during a long minority, derive immense profits from the possession of his minor's funds, while he imparts to him but a trifling part of them. This argument would have more force on the

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floor of the legislature, when deliberating on the quantum of interest, which tutors must allow, and the mode of calculating it, than before a court whose province is confined to pronounce what interest the law has provided.

In this case, the law has said that the tutor is bound to pay to his ward an interest, at the rate of five per cent. per annum. *Civ. Code*, 70, *art.* 71. This interest, from the words used, we are bound to say is that which after a judicial demand, or a special agreement, or when the law in other cases allows interest of course, becomes due; which is always simple interest.

We think the district judge acted correctly in denying the demand for $2129; the witness by whom it was offered to be proven was interested, and no relase was tendered him.

He was not so in disallowing the claim for $4919, the proceeds of the crop made by the plaintiff's mother during her widowhood, sold afterwards by her second husband, which became payable after her death.

The errors of calculation pointed out in the items charged and admitted below, clearly amount to $8855 68 cents, and with the in-

terest and the reduction of 10 per cent. due the tutor for his administration, make together a sum of $13,691 67 cents.

The crop of cotton just spoken of and the interest thereon, make the sum of $7902 04 cents, which being added to the amount allowed by the district judge, entitle the plaintiff to recover $76,746 39 cents.

The intervening creditors of the tutor urge that the district judge erred in admitting in evidence, the account settled by the original parties to this suit.

The provision of the law, that requires that the tutor's account be rendered before the judge, is clearly introduced for the exclusive advantage of the minor. No other person can have any interest in it.

If the tutor has creditors who imagine that he colludes with the minor to remove his property from their reach, they are not prevented from shewing this, by the absence of an account rendered before the judge. Such an account, as it would be be made without their being called to contradict it, would not stand in their way; and we cannot see of what use it would be to them. Had it been rendered, it would be open to all their objections. In this, we do not think the judge erred.

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Many arguments have been used by the creditors, to shew collusion; but the facts are not proved in such a manner, as to induce us to reverse the judgment and fix on the parties the imputation of fraud.

It is therefore ordered, adjudged and decreed that the judge of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiff, for the sum of seventy-six thousand seven hundred and forty-six dollars thirty-nine cents, with interest from the judicial demand till paid.

Derbigny for the plaintiff, *Mazureau* for the defendant.

VARION'S HEIRS vs. *ROUSANT'S SYNDICS.*

When heirs sue the representative of their ancestor, or their common tutor, the judgment ought not to be for the whole sum due to them collectively, but must ascertain that due to each.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs demand an account of the estate of their parents, which came to the hands of the defendants' insolvent, as the executor of the plaintiff's father and their tutor. They had judgment for $5324, and the defendants appealed. The plaintiffs under

the late act of assembly complained, that the court *a quo* erred in making them too small an allowance, and on giving judgment for a whole sum to be paid to them jointly.

After a very minute examination of the evidence, we are not able to say that the court below erred in the amount due by the defendants: but there is certainly an error, in making a joint allowance, and causing the eldest heir to pay a proportion of the maintenance and education of the youngest.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff *Francis*, recover from the defendants the sum of $1930, nineteen hundred and thirty dollars; the plaintiff *Mitchell*, $1486, fourteen hundred and eighty-six dollars; the plaintiff *Susan*, $1089, one thousand and eighty-nine dollars; and the plaintiff *Marian*, $819, eight hundred and nineteen dollars; in all, $5324, five thousand three hundred and twenty-four dollars; with costs in both courts.

Cuvillier for the plaintiffs; *Derbigny* for the defendants.

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Former judgment confirmed.

PORTER, J. A rehearing has been granted in the case on the application of the appellant, and he now contends that the *mortuaria*, or proceedings, connected with the inventory and sale of Le Breton's estate, must be taken together, and has argued that it clearly results from an examination of the whole of these documents, that the representatives of the deceased intended to sell, and that he contemplated buying the entire depth of sixty-six arpents.

I think that they may be looked into, and I agree, that if it should be found the adjudication, to the defendant refers to those proceedings for a description of the thing bought, that the whole may be taken and construed together.

On the death of Le Breton, application was made by some of his creditors, to the tribunal then established in this country, for the sale of his estate, and the liquidation of the debts due by the succession. Before the demand was finally acted on, Boré, tutor of the children, by the first marriage. petitioned, that the plantation with its appurtenances might

be sold, and an order to that effect was given and carried into execution.

An inventory had been previously made. In that instrument, this property is described as follows: "*las tierras de la havitacion de Don B. Breton tal que se halla e comporta, y conforme a los titulos que deven existir en el oficio de Don Pedro Pedesclaux*;" when cried on the plantation, it was designated as "*la habitacion de estos bienes y succession*," but no bidder being found to go as high as two thirds of the estimated price, the sale, on the petition of the parties interested, was adjourned to town. Here we find for the first time a particular description is given of the plantation, and it is stated, in the process verbal, to contain seven arpents front, with the ordinary depth.

It was put up at public sale three several times in the city before it was adjudged, a special act is made of the proceedings on each day. In the first it is stated, that the land was cried at auction, and that all present were called on to *mejorar*, advance on the bid of Florian, for a plantation of seven arpents front with the ordinary depth. The instrument which contains this description, is signed by the notary, by Le Breton D'Or-

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genoy, Deschapelles, attorney of the widow, Boré, curator of the children by the first marriage, Guinault, representative of those of the second, and by Daniel Clark one of the syndics.

The second time it was cried, the same proceedings took place; it is again designated as a tract of land having the front and depth, already mentioned, and the act is signed by the same parties, and by the present defendant who on that day was a bidder.

The third and last time it was exposed, it is once more cried as a plantation of seven arpents front by forty deep, and is adjudicated as such to the appellant in this suit, who with the other persons already mentioned, sign the process, verbal of the adjudication, some days after he executed "*la fianza*" in which he declared that he entered into an obligation for the payment of a plantation purchased at the sale of Le Breton's estate, containing seven arpents in front *con la profundidad ordinaria.*

It is unnecessary to state any other of the proceedings, as the decision of the point before us, must turn on the effect of the instruments just referred to.

I take it to be incontrovertible that unless

the vendors thought there were more than forty arpents in depth, and the buyer believed he was purchasing more, that there is no ground for permitting him to take any thing beyond it. And this position is not the least affected by an admission, which I readily make, that the order from the proper authority was to sell all Le Breton's property; if neither the heirs, nor their representatives were acquainted with the real extent of this property, and by mistake sold less; what remains is for them.

That the extent of the plantation (conceding the twenty-six arpents of wood land purchased in the rear to make a part of it) was not known to those who made the inventory, is apparent from the expressions used in describing it, neither front nor depth is given, but it is stated to be composed of lands according to the titles in a notary's office in New-Orleans. If the quantity which those titles gave a right to, had been known, we must presume the usual mode of stating that quantity would have been pursued, and that they would not have referred to papers in the custody of other persons, to ascertain the fact, if they had been acquainted with it themselves.

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To this strong testimony of the vendors not possessing an exact knowlege of the plantation owned by the deceased, we have still more positive evidence, that they did not understand it to have a depth of sixty-six arpents, when put up at auction in the city, the mode of designation first pursued of referring to the "*mortuaria*" is dropped. They explain what they conceive the "*habitacion*," to be composed of. In three several instruments of writing, executed at three different times, and signed by the representative of the widow, the tutors for the children, and the syndics of the creditors, it is declared to contain seven arpents in front with the ordinary depth, and to have been cried as such. It is difficult, it appears to me, now to conclude with the appellant, that these acts were not understood by the parties to them; that they did not read what they put their names to; every rule of evidence is opposed to the idea, and I do not think, that after such a lapse of time we are permitted to yield to conjecture, in opposition to express terms, and the presumptions created by a repeated use of them.

I am aware it may be said, these errors

ought not to injure the buyer. This argument would be entitled to much consideration, if it appeared he had been led into error by the description given to him of the property ; nothing of that kind, however, is alleged, and as his pretensions rest in a great measure, not on what was done, but what was contemplated to be done, the enquiry into the opinion of the vendor as to the quantity then about to be sold, is highly important. Let us next see, what was that of the vendee himself?

He does not appear in this transaction, until the second time the property is exposed at public sale in New-Orleans, and in the instrument which records what took place on that day, it is stated, that the notary on crying it at auction, called for a " *mejora*," on a bid of Livaudais for a plantation of forty arpents deep, by a front of seven, and that Fouché did rise on that bid. This act the defendant signs. He also signs the act of adjudication on the next day, by which the property is described as having the extent just stated, and the obligation or " *fianza*," executed by him, some days after he declares that he had bought the plantation of Le Breton, having

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the front already mentioned with the ordinary depth.

I am of opinion that his understanding of what he bought, is as clearly manifested by these acts, as we have already ascertained the vendors, to have been, and I have in vain endeavoured to believe he would have signed these instruments, if he had known, or even imagined they gave him less than he purchased. The fair conclusion it appears to me from the whole proceedings is, that neither seller, nor buyer, knew the plantation to have sixty-six arpents in depth; and if the representatives of a deceased person mistake the real extent of his estate, and sell but a part, when they intend to sell the whole, I am unacquainted with the law, which gives the portion that remains to the purchaser.

When, says *Pothier*, the object of the contract is an "*universalité de choses*," it comprehends every thing which composes that "*universalité*," though the parties had no knowledge of it. But he adds this rule, suffers an exception "*lorsqu'il paroit au contraire que les parties n'ont entendu traiter que des choses contenues sous cette universalité qui etoient a leur connoissance, comme lorsqu'elles ont traite relativement*

a un inventaire". He gives as an example, where one man sells to another his right to all the moveables of a succession as contained in an inventory, and states that if there was any thing else, not comprised in that instrument of which the parties were ignorant, it would not pass under the contract. *Pothier, traité des Obligations, no.* 99. Had the inventory stated "all the lands of B. Le Breton, containing forty arpents in depth," and the sale been made in reference to that description, the particular quantity stated, would have controuled the general terms, "all the lands"—this is the very case put by the author. Instead of that we have "all the lands" inventoried, but no quantity given, and the sale is made of a certain number of arpents. If there is any difference in those cases, I am unable to perceive it.

It is a settled rule that instruments of writing should be so interpreted that every part of them, if possible, is to have effect. Admitting that the adjudication in this case, referred to the "*mortuaria*" were we to say that by the word "plantation" must be understood one of seven arpents front by sixty-six, those expressions which state it as having but forty

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become useless; in the other alternative, the term plantation is not inconsistent with that which designates it as one of the ordinary depth. The latter construction should therefore be preferred.

It is proper, as there is a difference of opinion in the members of the court, to notice the several arguments by which the appellant's claim has been supported.

Many of them go to shew the original intention of the parties to sell the whole of the plantation. I have already observed that such, I believe, was their intention; but a knowlege of what they intended aids us but little in settling the rights of the parties before us, unless we can discover that they carried into effect what they had in view. The more material enquiry is, what did they sell, when the property was put up at auction and adjudicated.

Still less do I conceive it necessary to go into a severe inquiry, as to the causes which led to the error. It has been conceded there was a mistake made by the representatives of the deceased, as to the quantity of land, possessed by their ancestor, and I have already stated what in my opinion was the legal con-

sequence of such a mistake. For no matter how great may have been the error, it does by no means follow that the defendant can have more than he bought; he may on that ground avoid the contract altogether, but he cannot substitute an other in its place. The true question here is this, does the title of the appellant give the land to him? Are the expressions, which in so many acts limit him to forty arpents, controuled by others that will enable him to take sixty-six?

He insists they are so controuled for several reasons, and principally because the plantation was appraised in reference to certain titles, cried at auction in reference to this appraisement: and bid for in the first instance in relation to those titles. Hence, he concludes, that as he raised on the bid of those persons who offered a price for the whole, this gives him a right to every thing they could have obtained, and that the more especially, because he went to two-thirds of the price at which the entire plantation was estimated.

In examining this argument in which consists the whole strength, or nearly so, of the appellant's case, the first thing to be considered

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is, whether the facts support it. I believe they do not. The ajudication does not give to Foucher all the lands mentioned in the "*morluaria*," it does not state that there is sold to him every thing Clark bid for; it makes no reference to the inventory; nor to what Clark offered: it simply states that a tract of land with certain limits has been bought by him. The idea then that all the written proceedings, respecting Lebreton's estate, are to be taken as a deed of sale, and that the expressions in one part may be explained and controuled by those of another, does not appear to me correct. If the act, under which he holds, had referred to the inventory for a description, it would have presented a very different question: as it does not, I see no ground, for the position that they must be construed together.

But it is contended, Clark bid for all; Florian advanced on whatever Clark bid for; Livaudais raised on Florian's offer, therefore Foucher who was called on to "*mejorar*" the bid of Livaudais has a right to go back, and take whatever he could claim. I do not believe there is so entire and complete a privity between persons at public sales, as this ar-

gument implies. Were an auctioneer to present three slaves, and call on the bye-standers to advance on an offer just made for them, it would be going far I think, to hold that a person bidding on this annunciation, and having the property stricken off to him, could be compelled to receive two, because the person who preceded him had only bid for that number. The rule, if a true one, must bear this test.

The case of the appellant however, is not so strong as that just put, as the bid he was asked to raise on, was stated to have been for a certain quantity, which quantity corresponds exactly with that given at the time he first offered a price for the land, and that found in the act by which he finally acquired. To give this argument of the appellant, however, its due weight, it becomes necessary to examine attentively the facts. The inventory states no particular quantity. After Clark and Florian had went as high as they deemed prudent, on a description referring to another place for the extent and limits of the property, Livaudais presents himself, and on being called on with others to *mejorar* a bid of Florian, for a plantation of seven arpents front with

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forty deep, we find that he does advance on it. The defendant, in this suit, on the next day, is asked if he will raise on the offer which Livaudais had made for a plantation having a front on the river, of seven arpents with forty in depth, and he agrees that he will. The first deviation therefore, from the original description commenced with Livaudais, and had he purchased, he might perhaps have complained (though with a bad grace) that he did not think he was buying according to the limits given to him, and that he intended to purchase the indeterminate quantity that Florian had bid for. But does the appellant stand in his place to correct the error into which he may have been betrayed?—Surely not;—for he does not advance on Livaudais' bid, leaving the quantity to be ascertained by referring to another act, but on Livaudais' bid for a plantation of forty arpents in depth. Can it be correct then to say, that he purchased in reference to Clark and Florian's bids for an unknown quantity, when the act tells he advanced on another man's bid for a certain quantity? I think not; and I am clearly satisfied that the appellant first offered to purchase on the description given to Livau-

dais of what the plantation contained, not that found in the "*mortuaria*;" and that description corresponds exactly with the limits stated in the act of adjudication. But it is said, as the lands were not sold until the price offered amounted to two-thirds of the original appraisement, we must therefore presume it was intended to sell the whole. This is perhaps true; but if they did not sell it all, the circumstance of two-thirds of the original appraisement being given for a part will not entitle the buyer to the whole: intention is of little importance if it was not carried into effect.

Great stress is laid on the possession of the original title, because the law has directed the auctioneer immediately after the sale, to deliver it to the purchaser. This is setting up presumptive evidence in opposition to direct proof, and in my opinion the positive testimony must prevail. The effect which this circumstance would have is much weakened by reflecting that if this title was placed in defendant's hands immediately after the sale, it would have at once informed him that he had purchased more than the ordinary depth; and if so, he surely would not have signed an instrument afterwards by which he declared

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that he bought but that quantity,—nor would he have suffered six years to elapse before he intimated that there was error in the description of what he purchased.

There is no evidence before us that the parties to these acts did not understand Spanish, and if there were, the argument drawn from it would prove too much, for it would establish that neither vendor nor vendee knew what they were doing; consequently nothing could have been acquired on one side, or alienated on the other.

Nor, in my opinion, ought the cause to be decided, on the evidence of a witness that by the words "ordinary depth" were meant sixty-six arpents. This is contradicted by the grant under which the appellant claims, for it describes the twenty-six arpents as a second or extra depth; by the surveyor general in his plat of survey, who marks the first forty as "*la profundidad ordinaria*," and then designates the remainder by particular lines; by the appellant himself who did not believe the expressions ordinary depth, gave him this land, and applied to the syndics for another title; and lastly, by the universal meaning attached to these words, or their equivalent, in other lan-

guages, under the three governments which have possessed Louisiana.

I do not think that by the word appurtenance a double depth passes, when the vendor declares he sells forty.

What then, in a few words, is the whole case? Property, as of an unknown quantity put up at sale and bid for as such, afterwards, and before adjudication described as having a known quantity, and purchased by a particular designation of its limits. Under these circumstances I feel constrained to say that there has not been sufficient evidence produced to enable us to reject the positive description given in the act by which the defendant acquired. Our former judgment should therefore remain undisturbed.

MARTIN, J. The defendant's counsel has been heard, on a suggestion that our former judgment erroneously considered him without title to the back tract of his plantation.

He has drawn our attention, which had been confined to the process verbal of the day of the final adjudication, to those of the preceding days, to the inventory, appraisement, petition and order of sale. He urges that the

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several process verbal of the auction with these documents, constitute but one record, his title; that where a part of a record is apparently variant from the rest; it is proper to rectify the variance, or the error by the other parts of the record, the concordance of which manifests their correctness; that an inaccurate description of the premises sold, in the *habendum & tenendum* of a deed, may and ought to be rectified by a different one in the other parts of it, in which uniformity and other circumstances place its accuracy beyond doubts.

The whole *mortuaria* of B. F. Le Breton, or proceedings for the inventorying, appraising and selling the estate he left behind, makes part of the record in the case before us.

The defendant's counsel urges, that from a close examination of this *mortuaria*, a conviction must inevitably result, that the officers who made the inventory of his estate, the appraisers, the relations and creditors of the deceased who provoked the sale; the magistrate who ordered it; the notary, or auctioneer who executed the order of sale; the different bidders, all were impressed with the idea that the whole plantation of the deceased

was the thing inventoried, appraised, prayed for and ordered to be sold, bidden for, and lastly adjudged.

If we consider all the documents, inventory, appraisment, petition, order of sale, and the process verbal of the sale, on the days on which the bids of Clark and Florian were renewed, it is impossible to have the least doubt of the correctness of the proposition which the defendant's counsel endeavors to establish; and it is equally clear that if we consider only the process verbal of the days on which the bid of Livaudais and that of Foucher were made, the proposition will appear ungrounded.

I cannot entertain a doubt, that any part of a record, on which a manifest error is alleged to have crept, must be examined and compared, with a view to the detection and correction of the error, with the other parts of the document, and in giving effect to the whole, a judgment must be formed on a comparison of the parts. *Iniquum est nisi totâ lege inspectâ, de unâ aliquâ ejus particulâ judicare, vel respondere.* 8 *Co.* 117. *Incivile est nisi de totâ sententia inspectâ de aliquâ parte judicare. Hobart,* 172. These quotations, though immediately

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taken from books of the common law of England, evidently came there from the Roman, and the proposition they contain is almost self-evident.

The counsel for the defendant first calls our attention to the inventory and appraisement.

Las tierras de la habitacion, the lands of the plantation. For the situation, description and contents of this plantation, we are referred by the *mortuaria*, to the titles, which ought to be, *que deben existir*, in the office of P. Pedesclaux, notary public.

The copy of the titles, extracted from the minutes of that office, shews that the deceased purchased on the same day, by the same instrument, from the same persons, and for one price two tracts of land, which the defendant's counsel contends constituted the plantation; a riparious one of the depth of forty arpents, and a back one of the same width and of the depth of twenty-six arpents.

The counsel urges that the plantation sold was described as consisting of two tracts, because the vendor had acquired the premises by two titles, *viz*: the riparious by purchase, several years before, and the back tract, by

a grant from the Spanish government, on the day preceding the sale.

From the inspection of the inventory and appraisement, and of the titles of the deceased, to which the makers of the inventory refer us, I think the conviction is irresistible that they meant to inventory and appraise the whole plantation; and the plaintiff's counsel has not been able to point out a single circumstance giving rise to the belief or suspicion, that the parties were under an error and believed that the deceased owned the riparious tract only. The purchase had not been made so many years before, that its extent might have been forgotten—it was not a distant estate—Boré, the grand-father and tutor of the deceased's children, lived on the land contiguous thereto. The grant of the back tract was among the deceased's papers, and it will be seen by and by, was surrendered to the last bidder, the defendant, according to law, at the conclusion of the auction.

The counsel for the defendant next places under our eyes the petition of the relations and creditors of the deceased, to the judge, provoking the sale of the property of the estate, which the situation of the affairs of the de-

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ceased imperiously demanded. In this document the applicants pray for the sale of the plantation, with every thing annexed or corresponding thereto, *de la havitacion, con todo a el annexo y correspondiente.* It is urged, and I think with considerable reason, that neither in the inventory and appraisement, in the petition, nor in the order of the judge who ordered the sale accordingly, nothing allows us to believe that the riparious tract alone was contemplated. Nothing shews that the parties were under an error.

In the process verbal of the first day of the auction, the premises offered for sale are described as the plantation of this estate and succession, *la havitacion de essos bienes y succession.* The counsel for the defendant urges, and I think with great reason, that these expressions clearly relate to the whole plantation, not to the riparious tract only; but the counsel of the plaintiff contends the parties were all in error, they were ignorant of the back tract of thirty-six arpents, being a part of the estate. Of this mistake, ignorance or error, the record affords not the least suspicion. On the contrary, the presence of the grant, among the papers of the deceased, in the possession of

his friends—their knowlege of the existence of the deceased's titles in the office of a notary residing near them, afford some kind of negative evidence.

On this day, Clark was the last and highest bidder, for $16,000; but this being less than the two-thirds of the valuation, no adjudication was made.

In the process verbal of the second day, the notary describes the premises offered for sale as the plantation of this *mortuaria*, *la havitacion de essa mortuaria*, and Clark's bid on the first day was raised by different bidders, and lastly by Florian, to $16,600; but this being still below two-thirds of the valuation no adjudication was made.

It is not easy to deny the assertion of the counsel for the defendant, that the record clearly shews that both, Clark and Florian, did bid for the whole plantation of the deceased. He urges that the premises sold were described in the process verbal of the first day, as the *havitacion de essos bienes y succession*, the plantation of the estate and succession, on that of the second, *la havitacion de essa mortuaria*, literally the plantation in this record of the proceedings had on the death

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of, &c. In the first part of the record, the lands of the plantation are inventoried and appraised, and reference is made to the act of sale, in the office of Pedesclaux, the notary. By the inspection of this document, we find that the deceased had purchased, as I have already observed, two tracts, a riparious and a back one, which constituted the plantation, inventoried, appraised, the sale of which had been provoked by his relations and creditors, ordered by the judge and therefore proceeded on by the notary.

In the process verbal of the third day of the auction, the notary describes the land as having the ordinary depth, *el fundo ordinario;* expressly informing the bye-standers that he was continuing the sale, which he had began by order of the judge, and calling on them to raise, *mejorar*, the last bid, *viz*: Florian's for $16,600; Livaudais on this day was the last and highest bidder, having offered $19,600. This sum being still less than two-thirds of the valuation, no adjudication was made.

In the process verbal of the third day, the premises were described as they are in the rest of the record, as having the ordinary depth. In the morning of that day, Fou-

cher, the present defendant, raised Livaudais' bid to $20,000. A few dollars were lacking to reach the two-thirds of the valuation, and, in the afternoon, he raised his bid to $20,025, and the land was adjudicated to him.

The counsel for the defendant produces the original grant of governor Miro, to Villiers the vendor of the deceased, for the back tract of twenty six arpens in depth, which he alleges was delivered to him immediately after he executed his obligation for the price of the adjudication, according to the provisions of the Spanish law.

The counsel urges that the defendant, having been indulged with an extension of the day of payment, he did not take out his title till the payment was completed and having discovered the error, obtained, from the syndics of the deceased, a notarial act acknowledging that it was thro' mistake, that in the latter part of the *mortuaria*, the plantation was described as having the ordinary depth only.

It seems to me that the change made by the notary, in the description of the premises, in the latter part of the *mortuaria*, was a clerical error of that officer only. The judge had ordered the sale of the property inventoried and

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particularly of the plantation. The back tract made a part of this. It was inventoried and valued as a part of this. The idea that the relations and creditors of the deceased were ignorant of the deceased's right to the back tract is, in my opinion, repelled by the presence among the papers of the deceased of the original grant of gov. Miro to Villiers, surrendered to the deceased at the time of his purchase and by the judge to the defendant, after the adjudication. This back tract made *de facto* and *de jure* a part of the plantation, and the notarial act referred to by the appraisers, as existing in the office of Pedesclaux, furnishes complete legal evidence that this tract was inventoried and appraised, and its sale provoked by the relations and creditors of the deceased, ordered by the judge and commenced by the notary.

The variance in the description of the premises, which first appears in the process verbal of the third day of the auction, was introduced by the spontaneous act of the notary, and must be considered as a mere error. Nothing induces a belief that he had the intention of altering the thing sold—to put up in distinct lots, the two tracts which con-

stituted the plantation, the sale of which he had begun. This he could not well have done, without the consent of the parties. And in the very process verbal, far from announcing such an intention, he declares that he is continuing the auction already began and that the by-standers were invited to raise (*mejorar*) the bid of $16,600, made on the preceding day by Florian. The conclusion is irresistible that those who overbid, did bid for the very same thing, for which Florian had bid.

When, on the evening of the last day, the defendant raised the former bid to $20,000, the judge declared his inability to consent to an adjudication, as the plantation was valued at $30,050, and so the defendant's bid was less than two-thirds of the valuation. If we take the *mortuaria*, with a view to ascertain what quantity of land constituted the plantation which was valued at $30,050, of which the deceased's relations and creditors had solicited the sale, which the judge had ordered, we find by an inspection of the act of sale, to which the appraisers refer that the plantation consisted of two tracts, having together a depth of sixty-six arpens. If in the sequel the

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mortuaria presents another description, we must inquire whether the variance was the authorised act of the parties, or whether it has not the character of a clerical error of the notary.

Nothing enables us to conclude that the variance resulted from the intention of the parties, that a different thing should be presented as the object of the sale, on the last days. The parties did not make any application, the judge did not order the sale of any thing but the plantation, according to the inventory and appraisement, and the notary expressly mentions in the preamble of his process verbal of the third day that he intends to proceed on the sale, and auction already commenced. If we then believe, as we necessarily must, that no alteration was intended by any of the parties, we must conclude that the change or alteration in the description was erroneous.

I consider the whole record of the *mortuaria*, as one entire deed, the title of the defendant. In the inventory or appraisement, which I consider as the preamble of the deed, the premises intended to be sold, are described in such ample manner, that it is im-

possible not to conclude that the whole plantation, composed of the two tracts, was the object inventoried and appraised.

It is, however, urged by the plaintiff's counsel, that the parties were ignorant of the extent of the plantation, and believed that it consisted of the riparious tract only.

This appears to me a gratuitous assertion. It is not to be reconciled with the circumstance that they knew that the deed, by which the deceased had acquired, was in the office of a particular notary, close by them,—that they were in possession of the grant of Gov. Miro to Villiers, the deceased's vendor, of the back tract, surrendered at the time of the sale. Bore, the curator of the deceased's heirs, by the first wife, (his daughter) owned and lived upon the adjoining tract.

The quantity of land, alluded to in the appraisement, was certain. *Id certum est quod certum reddi potest.* If absolute certainty be required in any thing, it is in a final judgment, and we have held that it is sufficiently certain, although the amount decreed be not mentioned therein, but appear only from the documents in the suit. *Dickins' executors* vs. *Bradford's heirs*, 4 *Martin*, 311. Here the quantity of land in-

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ventoried and appraised, as constituting the whole plantation, is made certain beyond a doubt, by the reference which is made to the title in Pedesclaux's office.

If we believe that the quantity of land inventoried and appraised is certain and definite, we cannot entertain a doubt that the quantity, for the sale of which the order of the judge was solicited, is equally so: for the petition refers to the inventory and appraisement.

No doubt can be entertained that the judge ordered a certain and determinate quantity of land to be sold, *viz*: two tracts, inventoried and appraised.

Nor that the notary, by whose instrumentality the sale was made during the two first days of the auction, intended selling a certain and determinate quantity, *viz*: that which the judge had ordered him to sell; that of which the sale had been petitioned for; that which had been inventoried and appraised, and which by a reference made by the appraisers to the record of Pedesclaux, clearly and unequivocally appears to be that contained in both tracts.

Clark and Florian bid most certainly for those two tracts.

Notwithstanding all this, the counsel for the plaintiff says, we must conclude those who made the inventory, the appraisers, the relations, the creditors of the deceased, the notatary, were all under a mistake and firmly believed the plantation consisted of the riparious tract alone, and none of them knew there was a back tract, which had been purchased with the riparious one. Yet it is shewn the original grant of governor Miro to Villiers and wife, the vendors of the deceased, for this back tract, was among his papers, and is referred to in his act of sale.

The counsel for the plaintiff urges that the inventory and appraisement refer not to titles which certainly, but probably are, in the office of Pedesclaux : *que deven existir.* The literal translation of this expression in our language "which ought to exist," favors, I admit, the conclusion of the counsel.

Had the appraisers intended to represent the existence of the titles to the property they valued as probable only, not as certain, they would have said *que deben de existir*, instead of *que deben existir.*

Debe de ser, says *De la Hurta*, supposes the existence of a thing, which of itself appears

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doubtful. The scripture says so, and *debe ser creido*, we must believe it; because there can be no doubt. Others say so, it ought to be believed: *debe de ser creido*; because common opinion renders it probable—induces a belief that it is so. *Sinonimos Castellanos*, CXVIII, *debe ser, debe de ser.*

We are to presume that the makers of the inventory and appraisers, who acted under the obligation of an oath, did their duty. That they required correct information of the contents of the plantation: and that such information was given them.—That it was within the reach of the parties, we have the most conclusive evidence.

The counsel of the plaintiff discovers, what he terms conclusive evidence, of their ignorance of the contents of the plantation, in the absence of a description of it by a reference to the quantity of arpents in the front and depth.

Appraisers, almost universally, attend on the land to be valued: they preambulate it: the boundaries are pointed out to them. They are seldom, hardly ever, attended by a surveyor: the title deeds, not being necessary to the operation which they are called on to perform, are rarely produced to them. As the

eye does not enable them minutely to ascertain the length of the lines, there is no necessity of their stating it, and it suffices that they should clearly designate what they value. This was, unambiguously done, in the present case, by a reference to the titles, in the notary's office.

If we admit, and I am unable to see how we can doubt it, that the appraisers valued what they inform us they did, the plantation of the deceased, according to the titles, &c. we must consider it as a matter of no moment, whether the relations and creditors had correct or incorect information, or any information at all, in regard to the extent of the plantation. They petitioned for the sale of the plantation, according to the inventory and appraisement, and it was ordered accordingly by the judge, whose decree is sufficiently certain: it refers, as to what is ordered to be sold, to the appraisement and the appraisement refers to the title. Here we have legal certainty, and there is not the least ground to imagine that any body erred.

The notary proceeded to carry the judge's order into execution; on the two first days of the sale, the proceedings are carried on with

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legal certainty; he describes what he is selling, by a reference to the antecedent part of the record. Clark and Florian bid accordingly.

On the third day a variance creeps into the record. What is its character? If it was not voluntary, it must have been erroneous. The notary, who made it, cannot be supposed to have intended to vary, to change the thing, which was the object of sale. Nothing induces a belief or suspicion that he did: every thing shews that he did not: indeed, he had not the power. If, by using a different expression, he varied, he changed the thing, while he had not the intention of doing so, he erred.

The counsel for the defendant urges that this was the case; and he presents the following circumstance, as the cause of the error:— Hitherto, the auction had taken place on the plantation: on the third day it was continued in the city, and the notary, being thus near Pedesclaux's office, imagined it correct to resort to the title of the deceased, in order to give the most accurate description of the plantation he was selling. Taking up Villiers' sale to the deceased, he took down the de-

scription of the riparious tract, given in the first page, the *recto:* and as this description finished the page, he stopped without turning the leaf. Thus, the description of the back tract, which immediately followed, in the beginning of the second page, the *verso*, escaped his notice.

There is considerable force in the observation of the counsel, that it is impossible to connect the conduct of the notary, in this particular, with that of the appraisers, a considerable time before, so as to conclude that the description, now given by the notary, is evidence of the ignorance of the appraisers of the true contents of the plantation.

I cannot receive it as such; and my mind remains impressed with the idea that the appraisers did not err—that they valued what they certified they did value—the whole plantation as described in the act of sale of Villiers; and, when I look over that document, I find the back tract included, as part of the plantation.

It is clear the relations and creditors petitioned for the sale of the whole property appraised, and I do not think that the subsequent proceedings could be declared less valid, on

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positive evidence, that the petitioners had not a correct idea of the contents of the plantation. They wished *the whole* sold, and it suffices, for the regularity of the sale, that the appraisers should appear to have known what they did value. They were not parties to the proceedings after the order of sale, and the expressions thereafter used in the description of the plantation, without their knowlege, cannot aid us in discovering what passed in their minds.

It is true the relations and creditors subscribed the process verbal of the last days; and the counsel for the plaintiff urges, that their signatures are evidence of their belief that the back tract was no part of the plantation. To this, the opposite counsel replies, that their signatures, at the foot of the process verbal of the preceeding days, are equally evidence of the contrary.

It is further urged that the proceedings of the *mortuaria*, like all judicial proceedings, were carried on in the Spanish language. That all the relations and creditors who subscribed (with the exception of an Irish gentleman) appear by their names to be French, and may well be presumed to have been ignorant of

the Spanish language. This objection, in my opinion goes too far—for it would avoid every act couched in any language but the vernacular one of a party. It cannot, however, be denied that when fraud, or error is suggested, it may have some weight.

Errors, in legal proceedings, ought not easily to be presumed.—Those who are conversant with those of the Spanish government, in Louisiana, know they were not rare. The counsel for the defendant has laid his finger on two important ones, besides the one which is the ground of the question that embarrasses us. In the sale of the estate of L. F. Lebreton, deceased, L. F. Lebreton himself is named as one of the relations, who assisted thereat, *ante* 14. At the conclusion of the sale, under consideration *Louis* Foucher is named as the vendee, while he was only surety for the defendant, his brother, *Pierre* Foucher.

It is clear that either the appraisers or the notary erred. Nothing, I say emphatically nothing, enables me to conclude the former did err. The latter was attempting to describe what he had been ordered to put up at auction, and he had been ordered to put up what

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had been appraised. His description does not accord with what the appraisers describe, and as I cannot conclude that they erred, I must say the notary did.

I rather think that the signatures of the relations and creditors do not cure the notary's error. The sale was a judicial one—the judge was the principal party—they assisted at the sale to see, on the part of those whom they represented, that it was fairly carried on.

The judge himself was under no error, when according to the prayer of the applicants, he ordered the sale of the property appraised.

But, the counsel of the plaintiff urges that he afterwards approved the final adjudication, which was of the plantation "with the ordinary depth," an expression which effectually excludes the back tract.

The possession of the original grant of the back tract is presented to us, by the counsel, as conclusive evidence that the judge considered this tract as part of the plantation. But, the counsel for the plaintiff replies that the defendant did not shew when, where, or by whom this document was delivered to him. If the payor of a note present it, the legal

presumption is that he obtained it fairly, *i. e.* by paying its amount. When nothing unfair is shewn, *omnia recte presumuntur.*

In the present case, every thing tends to support the presumption. that the grant was delivered to the defendant by the parties, who had provoked the sale, under the direction of the judge, who had ordered it.

The Spanish law makes it the duty of the judge, by whose order a judicial sale (one ordered by a judge) is made, to cause the applicants to deposit the titles of the premises sold, *que incontinente ponga en el officio los titulos*, and when the vendee has complied with the terms of the sale, these titles are delivered him, with a copy of the process verbal of the sale : *se le entrega los titulos, con la escritura de venta. Febrero adicionado*, 2, 3, 2, § 5, *no.* 335.

Here, the relations and creditors of the deceased applied for the sale of the whole plantation, and every thing corresponding and appertaining thereto, according to the titles in the office of Pedesclaux. The judge directed such a sale and the notary evidently proceeded to the sale of the premises so ordered to be sold. Now, as the applicants do not appear to have altered their minds; as the

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judge rever modified his order, it was the duty of the former to deposit in the office of the judge, the titles to the whole premises, the sale of which they had provoked, *viz:* to both the riparious and the back tract—and the judge was bound to see that such a deposit was made. The vendee had also a right to require this, before he complied with the terms of the sale. After these terms were complied with, it was the bounden duty of the judge to have the titles thus deposited, in his office, surrendered to the vendee. Now, the defendant shews by the inventory, that the back tract made part of the plantation, the sale of which was petitioned for, ordered and begun—that he was the vendee, and he produces the original grant or title, to this tract. His counsel urges, and I think very properly, that these circumstances, in the absence of any proof (and in this case there is not even a suggestion) of his having obtained possession of the document unfairly, or at any other time, or manner, (or from any other person) that he received it, after having complied with the terms of the sale, from the judge, who had ordered the sale, as the only original part of the titles to the land sold,

which was in the possession of those who had applied for the sale. If this possession be not a legal presumption, the production of a note by the maker is no legal presumption of its having been surrendered to him by the payee, on the payment of its amount.

If we believe this, and I see no ground for disbelief, the conclusion is inevitable, that the land mentioned in the grant was intended by the judge to pass as part of the plantation.

The defendant, it is true, subscribed the process verbal of the last day of the sale, and the obligation for the payment; in these documents the purchased premises are described as having the ordinary depth.

His counsel urges, that notwithstanding this he may, if the error be proven, obtain its correction, by the antecedent parts of the *mortuaria*. If the error had been the reverse of what it is, and instead of diminishing the quantity of land had encreased it, could the vendee have resisted the amendment?

Beyond the back tract of twenty-six arpens, is another of fourteen, that once made part of the plantation, which we have formerly seen, while it belonged to Belair, had a depth

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of eighty arpens.—*Ante* 13. Now, if the notary instead of using the expression "the ordinary depth," had used that of "the depth of eighty arpens," could Fouchér have claimed the last tract of fourteen arpens, and would not the court have said that it was proper to ascertain what the notary had been authorised to sell by the judge, what the relations and creditors had requested the judge to order the sale of—what had been inventoried and appraised—what was contained in the sale from Villiers, to which the appraisers had referred ?

In such a case, even if the deceased had been the owner of this last tract of fourteen arpens, having acquired it distinctly, or by another title than that to which the reference was made by the appraisers, his heirs might say they were ignorant of the existence of this tract, as part of the succession. There would not be the least room to believe that it was inventoried or appraised, and Foucher would certainly have been restrained to the quantity of land which, from the *mortuaria*, would appear to have been appraised and ordered to be sold.

Lastly, if additional evidence be required of Foucher's belief that he had acquired

the two tracts, we have, independently of the care which he took to secure the original grant of the back tract, the declaration of the syndics of the creditors of Lebreton, consigned in a notarial act, in which they declare that it is thro' mistake, that the words "with the ordinary depth," were inserted by the notary, in the process verbal of the two last days of the auction—that the sale of both tracts had been petitioned for, ordered, and in their belief, carried into effect. We have it also in the silence of the heirs, who, although they must all be of age, upwards of twenty years having elapsed since the sale, have never imagined that this back tract was not sold.

My mind more easily receives the idea that the error crept in the record, in the manner which the counsel for the defendant suggests, and passed unnoticed by the relations, the creditors, the judge and the defendant, than it can entertain a belief that the family, creditors and neighbors were ignorant of the extent of the plantation, while it was known that the act of sale, in which its extent was particularly stated, was in the office of a particular notary, residing within about six miles from it; while the original grant of Governor

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Miro, for the back tract was among the papers of the deceased.

Lastly, fraud is never to be presumed; it must be proven, before a judge permits himself to believe it exists. Now, I cannot arrive at the conclusion, to which the argument of the plaintiff's counsel is calculated to lead me, unless I assume it as a fact (without the least tittle of evidence and even without suggestion) that a gross fruud was committed. The original grant of the back tract, in the possession of the defendant, is presented to us and is really a very strong evidence that this tract was adjudicated to him. This document made part of the papers of the deceased, and if it did not pass into the hands of the defendant, in the manner in which he alleges he received it, I must conclude he obtained it unfairly—fraudulently. The meanest individual has the right to expect that his judges should presume him honest till the contrary is made manifest. I ask, what evidence have I to doubt the correctness of Foucher's conduct?

To conclude, it seems to me that the defendant's counsel by placing before us the proceedings which preceded the proces ver-

bal of the last days of the auction, has fully manifested that the notary committed a clerical error, which we are able to correct by a close examination of the anterior parts of the *mortuaria*, and which, in my humble opinion is placed beyond doubt by the production of the original grant.

I think therefore, that the judgment we hitherto pronounced in this case, ought to be set aside, and there ought to be judgment for the defendant, with costs of suit, in both courts.

MATHEWS, J. I concur in the opinion of judge Porter, for the reasons there expressed.

Moreau and *Mazureau* for the plaintiff, *Hennen*, *Grymes* and *Livingston*, for the defendant.

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Mere proof that the insolvent admitted the debt, nor even his written acknowlegement, will not establish it against his estate.

Otherwise, if circumstances render it probable.

The wife of the insolvent may vote, altho' she has not renounced.

APPEAL from the court of the first district.—10 *Martin*, 690.

PORTER J. delivered the opinion of the court.* This case has again come before us, on an appeal from the judgment of the inferior court, confirming the appointment of syndics.

The first question presented is, that the

* MATHEWS, J. was prevented by indisposition, from attending.

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matters and things now in dispute have already been adjudicated on between the parties, and have acquired the authority of *res judicata*. The opinion, formed on the whole case, renders it unnecessary to examine this point.

The next error is, that the opposition to the votes, should have been made before they were received by the notary, and in support of this 10 *Martin*, 59, has been quoted. The same reason which prevents the plea just mentioned from being decided on, induces us to refrain from entering into this. It may not, however, be improper to remark that the opinion of the court there, was merely intended to express the effect which a want of opposition to a vote before the notary public, had, as to the regularity of voting at all, and left untouched the right which each had, to make opposition before the court and have the facts, which they might choose to put at issue, tried in due course of law.

That opposition has been made here; the parties were at issue in the district court, and went to trial on it; we shall, therefore proceed to examine the different claims presented.

It is laid down as law, by the Spanish writers, and it has been decided by this court.

that in cases of insolvency, the acknowlegement of an instrument in writing, and confession of debt, on the part of an insolvent, is proof sufficient to establish the debt as against him, but not against the creditors; for it is presumed to be fictitious, and made with a deliberate intention to elude these rights, and though it should appear by a note of hand, it does not prove its legitimacy; and for this reason he, who does not prove his debt by other means, ought not to be considered as a true and lawful creditor. *Febrero, juicio de concurso, lib.* 3, *cap.* 3, §1, *no.* 33. 3 *Martin*, 707.

From this principle, it results that all claims given at the meeting, in this case, to which opposition has been made, and which are proved only by the production of the insolvent's notes, and the oath of the creditors who hold them, must be rejected. Still less, can we admit claims that are established on weaker evidence; such as those which the witnesses do not speak from their own knowlege, but from hearsay.

On the part of Chiapella, Labatut and Tricou as syndics, there voted the following persons to whom no objection has been made, or

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whose right is clearly established, *viz*: Macarty, Chiapella, Labatut, Guidel and Malus; the amount of their debts, when added together, is $120,115 76 cents.

In favor of Chabaud and Percy, there are the votes of Old & Co., Habine, Gros, Denistoun, Hill & Co., and Townsley & Co., which are either admitted to be correct, or have been substantially established: their aggregate amount is $17,616$\frac{69}{100}$.

On the part of the syndics who had the majority, there were two claims against the insolvent's estate, on which Caisergues and Madame Lanusse voted—they require a particular examination.

And first, as to that of Caisergues; he voted at the meeting for the sum of $24,520, declaring in his affirmation, that the debt due him was founded on fourteen notes endorsed by Lanusse, for the sum of $30,650, on which sum he had received from Tricou & fils, $6130. Before the trial was had on the opposition made, he surrendered to the persons last mentioned, all the notes on which he voted, and he was received as a witness to prove the amount due him, at the time the *concurso* took place before the notary. A bill of ex-

ceptions was taken to his testimony, but it has been abandoned before this court.

The notes produced in support of this claim were in number, nine. Six drawn by Tricou & fils, and endorsed by Lanusse for $14,000, three by Dutillet & Sagory to the order of Lanusse, for $9000, with his indorsement, together with protest made at the request of Caisergues.

We think this testimony is sufficient. The oath of the witness corresponds with the declaration he made when voting, that they were notes indorsed by Lanusse. There is a variance, it is true, between the description given by him of the papers delivered to Tricou, and those produced on trial, but that description is not stated in positive terms, nor can we believe him unworthy of credit. From the amount of the notes produced, there must be deducted $6130, which he states in his original declaration, he received on account of the obligations held by him. This leaves a balance due of $16,870, for which sum he is entitled to vote.

The next is the claim of the wife of the insolvent, which has been most obstinately disputed.

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She has attempted to establish it—by the last will and testament of her father—by the inventory of the property left at his decease—by an account current between her husband, and B. Macarty her brother, in their capacity of testamentary executors of her ancestor, J. B. Macarty—by sales between his heirs of different portions of the property descended to them—and by various deeds made by the executors aforesaid, in which they state the objects sold by them to have proceeded from the estate of her father.

To this it is objected.

1st. That she has not renounced the community of *acquests* and gains.—Second, that the books of her husband produced by her shew that only $45,000 were due, and that she must be bound by evidence which she has presented in support of her claim. Third, that the documents on which she relies are the acts of third persons and cannot affect or conclude those who were strangers to them, and that she cannot have the benefit of the whole price of the sale of the plantation and negroes to her brother, because it was in his possession and that of her husband for years before this transfer, and that no evidence has been offered to shew whether the great in-

crease which has taken place in its value has proceeded from a rise in the property, or from improvements made by the community. In support of the presumption that it results from the latter, they rely on an act introduced by Mrs. Lanusse, which establishes that thirty-four negroes were purchased by Lanusse and Macarty, during the partnership, and placed on the plantation.

I. The renunciation of the community. This point, made by one of the counsel for the opposing creditors, was not much insisted on by the others. It seems to us that the general principle of our law is, that the wife's property should not be made responsible for the husband's debts,—that the provision in the *Civil Code*, which requires her in case of his death to renounce within a certain time, is an exception to this principle—that it ought not to be extended beyond the case there put, and that the rule there contained in the 88th article, page 342 of the same work, which declares that in case of a separation of property she *may accept*, has a much stronger analogy to that now before us.

II. The introduction of the books of her husband, and whether the statement there

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made is conclusive of her rights? We think not. The general principle is as stated by the opposing creditors, but this case offers an exception to it. The account shews, that by an account regulated between the executors of her father, the sum of $45,000 was due to each of the heirs; which sum resulted in a great part from the sale of a plantation made by the executors to themselves. This evidence cannot, in our opinion, prove that sale, which from the nature of things, was impossible, and from positive regulations, illegal, 11 *Martin*, 292; the rule therefore relied on, must yield to the more imperative mandate of the law, which will not suffer a married woman to alienate her immoveable property without certain solemnities, among which is not enumerated, the introduction of testimony such as this, on the trial of a cause.

III. The most difficult question this claim presents is, whether she has made sufficient proof that any thing is due to her, and if any, how much. The property was paraphernal, and it is true that the husband is only responsible in case it come into his possession, and was enjoyed by him. *Civ. Code* 334, *art.* 61 *and* 62, *Febrero, juicio de concurso, lib.* 3, *cap.* 3, §1. *no.* 49, *par.* 4, *tit.* 11, *l.* 17.

We have already seen that the simple acknowlegement of the debtor, or his signature to a note is not sufficient to enable a creditor to vote. *Febrero*, in the number next succeeding that cited in support of this doctrine (*no.* 34,) states, that when with this confession concur "*otros adminiculos*," other circumstances, which destroy the presumption of fraud, this evidence will be sufficient to make the persons adducing it considered as real and *bona fide* creditors.

These expressions, "other circumstances," leave a painful latitude to those who have to decide such cases. As to the claim of the wife, however, we have authority a little more positive. The author just referred to enters considerably in detail, respecting the evidence which she must produce in the *concurso*, and he states in his 7th and 8th conclusion, that when the confession of the husband is "*adminiculada*" it is full proof of the delivery of her dower. He declares by this expression "*adminiculada*" to mean among other circumstances, that which arises from the quality and condition of husband and wife—the promise of dowry preceding the confession of it—the proof of payment of some part of what

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is stated in the act of acknowlegement—the finding among the property of the husband, immoveables which belonged to the wife. *Febrero, cinco juicios, lib.* 3, *cap.* 3, § 2 *no.* 159 *and* 160.

The instances here put, from which the verity of the husbands acknowlegement is presumed are not exactly presented in this case, but it offers others equally strong. The condition of the parties,—the inventory of the father's estate, which shews that he left a large property,—the acknowlegement of the executors that they received it,—various sales by authentic acts made by these executors, years before the failure of Lanusse could have been contemplated—the deed to Macarty for the plantation four years preceding the insolvent's application for a respite; all these are strong circumstances to support the truth of Lanusse's confession, made in a public act, that he received notes, and obligations, and real property in town to the amount of one hundred and thirty thousand dollars in payment for the one half of a plantation, the third of which was the property of his wife.

But it has been urged that in this act of sale there is an acknowlegement that Lanusse

and his wife received the sum of fifteen thousand dollars, and it is contended, that there is no proof that any part of this was given to him. To this, it may at least be answered, that it is as strong evidence that he received the money as that she did. Taking it most strictly, it establishes that one half was received by each; $7500 by the husband in payment of that part of the plantation which belonged to the community, and the same sum by the wife for that portion which belonged to her;—and so we will consider it.

Lastly, it has been pressed on us that the thirty-four negroes put on the plantation must have augmented in the same proportion with the whole, and in this position we concur. Making this addition to the original cost, there must be deducted the sum of $16,660, which added to the $7500 already stated will leave a balance of $66,962$\frac{33}{000}$, for which she was legally entitled to vote. As to the objection that there may be still further deductions to make for other ameliorations of the husband, the same argument would destroy every other claim, as there may be also set-offs against them.

So that on the whole, we will have notes for

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Labatut, Chiapella and Tricou, to the amount of $203,832 $\frac{76}{000}$, and this gives them the majority, admitting the Planters' Bank to have proved their whole demand.

It is therefore ordered, adjudged and decreed, that the judgment of the district be affirmed with costs.

Seghers, on an application for a re-hearing.

In the enumeration of the votes in favour of Chabaud & Percy, the court has omitted that of I. & I. D. Forcade of Bordeaux, who voted for $5194 45 cents, by an attorney in fact, whose powers are on record. Their claim is founded on an account current, likewise on record. It is true that the claim is not supported by the deposition of the witness; but, independently of this deposition, the claim rests on the confession of the debtor and his signature to the account, with which concur other circumstances, which destroy the presumption of fraud. The document, no. 12, shews that this claim proceeds from the sale made by Lanusse of a whole cargo, consigned to him by Forcade, and in which he was interested for one-half, and Forcade for the other. This fact, it is believed, destroys every

presumption of fraud: it was not contested at the trial before this court, nor was there ever an objection raised, by any of the adverse counsel, against this claim.

The court has likewise omitted the vote of N. Cox, final syndic of Dutillet & Sagory, for a claim of $10,780. A similar vote was given for Messrs. Labatut and Lachiappella, by D. Bouligny, provisional syndic. Before the notary, and before the court below, both parties claimed the benefit of that vote; which, of course, implies the acknowlegement of the truth of the claim. There was nothing else at issue between them on this subject, than the authority of the voters: on this head we refer the court to our first argument and the document no. 10.

A small error of calculation has been made in adding together the claims of Old, $700; Habine, $13,491 75; Gros, 1617 66; Dennistoun, Hill & Co. $428 28; Townsley, $480—which make the aggregate sum of $16,717 69 cents, instead of $16,616 69. If to this we add the claim of the Planters' Bank, as it is admitted by the judgment of this court $179,084 05, and the two votes above men-

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tioned of Forcade and Cox, we will have a majority in favour of Chabaud & Percy.

According to the principle "that all votes given at the meeting to which opposition has been made, and which are proved alone by the production of the insolvent's notes, and the oath of the creditors who hold them, must be rejected," the vote of Caisergues could not be received. There is no evidence of any consideration having ever been paid for the notes produced in support of his claim; the signatures to those notes are not even proved. His own deposition is the only one introduced on this subject, and he is silent about those particulars. Nothing is adduced to destroy the legal presumption of fraud. It may, perhaps, be observed that this objection was not raised at the trial before this court; but the principle was first invoked by the adverse party, and it must, therefore, the more strictly apply to their own case and to every branch of it—at all events, the observation would only apply to the six notes, amounting together to $14,000, and the objection would remain in full force as to the three others, amounting to $9000, which would reduce his vote to $7870, instead of $16,870—for which this court has admitted it.

An omission and some mistakes are thought to have taken place in settling the amount for which the vote of Made. Lanusse is admitted by the judgment.

1st. The court has omitted to deduct from her claim one-third of the $8000, which have been paid to, or rather less received from the heirs of Prevost, by the transaction, which is in evidence *sub littera*, *K*.

2d. The court has comprised in their calculation of this claim a sum of $500, which is alleged to be a present made to Made. Lanusse by her grand-mother, and whereof there is no evidence on record.

3d. In deducting $7500, for one-half of the $15,000, paid cash by B. Macarty, as stated in the act of sale to him by Mr. & Mrs. Lanusse, the court grounds this proportion on the part of the plantation which belonged to the community, and on that which belonged to the wife. In this it is thought there is error: one-third of the plantation descended to Made. Lanusse, from her father; one-sixth was bought, by Lanusse, from Edmond; thus their proportions were from two to one, and therefore their shares in the $15,000, must be $5000, for the community, and $10,000 for Mde. La-

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nusse; which increases the deduction, of the sum of $2,500.

4th. By the same deed of sale, *sub littera I*, Mr. & Mrs. Lanusse acknowlege to have received, jointly, an additional sum of $25,000, in a house and its dependencies, situated in New-Orleans. This is clearly a *remploi* for so much; and as there is no evidence on record that the husband disposed of the house, his wife has no claim on him for her proportion in that amount; she must still be considered as the owner of the two-thirds of that house, and her claim must consequently be reduced in that proportion; that is, for the two-thirds of the $25,000, the price of the same.

5th. The court allows a deduction from her claim of $16,660, for her proportion in the thirty-four negroes put on the plantation by Lanusse, calculated on the price of the sale to B. Macarty. Here we must be permitted to urge again an argument set forth in our observations, and which seems to have been overlooked. The claim of one-third or two-sixths of Madame Lanusse on the plantation and slaves, does not extend further than to what descended to her from her ancestor. To prove in what it consisted, she brings forth the

inventory in which the slaves are designated by their names. It is in evidence, by her own documents, that many of them were sold and accounted for by the executors—many may have died between the date of the inventory and that of the sale to B. Macarty. The presumption is, that they have been replaced by the partnership of Lanusse & Macarty. Of this, it is true, we have no evidence, nor could we procure it, but we need none. The deed of sale to B. Macarty sufficiently evinces the fact. There 130 negroes are sold, and it is there stated that they descend partly from the father of Madame Lanusse, and come partly from purchases made by Lanusse and Macarty. It was then necessary to establish the number descending from the father, to compare their names with those of the inventory, and by this comparison it will be found that 70 only of that description remained at the time of the sale. Hence, it follows, that the 60 others belonged to the partnership of Lanusse & Macarty, and thus, that the court, in deducting the proportion of Madame Lanusse in the value of 34, made an omission of 26, in whose value she owes also her proportion. The sum of $16,660, allowed for the

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34, gives an average of $490 for each, which, for the 26, makes a supplementary sum of $12,740; which sum being deducted from the one found by the court, to wit: from $66,962 33 cents, leaves a balance of $31,889, to which, we believe, the vote of Madame Lanusse must be reduced.

PORTER J. delivered the opinion of the court. If we were to admit the claim of Fourcade, because it is supported by other circumstances, we would be obliged also to admit that of Tricou & sons, and others in favor of the appellees, which would make the balance against the appellants still larger.

The vote of the definitive syndic for Chabaud & Percy, cannot be received, because the provisional syndic voted for Labatut and Tricou. It is an admission between those parties as to the amount, but it certainly does not conclude other creditors.

The error in the addition of $107, does not vary the result as the majority was established by more than 7000 dollars.

The bill of exceptions taken in the court below to Caissergues' evidence, having been withdrawn, he was a good witness; especially

under the declaration made by him on oath, that he had no interest in the matter in dispute.

The proportion of madame Lanusse in the sum of 8000 dollars, which formed the subject of the compromise with the heirs of Prevost, entered into our calculation, and was deducted.

We did not take into view the donation from the grand-mother.

The construction put on the receipt was a strictly legal one; it was given by husband and wife, jointly; and if we even yielded to the construction of counsel, there would still be a majority for appellees.

The title to the house was made to the husband by the wife's consent; he accepted it, and thereby became accountable for the price.

We refer to the opinion for our understanding of the law on the question on whom the burthen of proof was thrown as to the improvements—if, in truth, any such were made. We do not think that it was the duty of the wife to furnish evidence of them. She satisfied the terms of the deed from herself and husband to Macarty, which states that the slaves descended partly from her father, and

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were partly purchased by Lanusse and her brother, when she produces a bill of sale of thirty-four negroes, put there during the partnership, and gives credit—if she had proved 20 more, the same objection could be still made—that there might be some more.

There is not any thing offered which was not considered; for we thought the equity of the case, with the appellants, and the appellees only prevailed from the strength of their legal rights.

The rehearing is refused.

Seghers for the plaintiffs, *Mazureau* for the defendants.